United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1296
76-1297

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To be argued by
ALAN R. NAFTALIS

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 76-1296, 76-1297

UNITED STATES OF AMERICA,

Appellee,

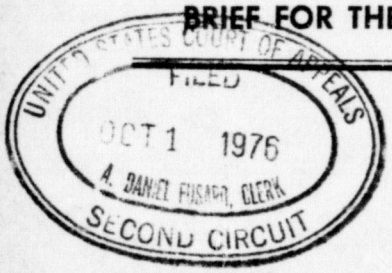
—v.—

JAMES F. HEIMERLE and HAROLD ROSENBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James F. Heimerle and Harold Rosenberg appeal from judgments of conviction entered June 15, 1976 and June 25, 1976, respectively, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 76 Cr. 146 was filed in four counts on February 11, 1976. Count One charged the defendant Heimerle with selling and delivering on January 28, 1976 counterfeit $100 Federal Reserve notes, in violation of Title 18, United States Code, Section 473. Count Two charged Heimerle with selling and delivering counterfeit $100 Federal Reserve notes, in violation of Title 18, United States Code, Section 473. Count Three charged Heimerle and the defendant Rosenberg with selling and delivering on February 6, 1976 counterfeit $100 Federal Reserve notes, in violation of Title 18, United States Code, Section 473. Count Four charged Heimerle and Rosenberg with having conspired to sell and to deliver

326 counterfeit $100 Federal Reserve notes, in violation of Title 18, United States Code, Section 371.

Trial commenced on May 3, 1976, and ended on May 5, 1976, when the jury convicted Heimerle on all four counts in which he was charged and Rosenberg on both counts in which he was charged.

On June 15, 1976, Judge Metzner sentenced Heimerle to concurrent seven year terms of imprisonment on Counts One and Two and a concurrent five year term of imprisonment on Count Four, to be followed upon the expiration of the terms of imprisonment by a five year term of probation on Count Three. Rosenberg was sentenced by Judge Metzner on June 25, 1976 to concurrent terms of one year's imprisonment on Counts Three and Four.

Rosenberg is at liberty pending this appeal. Heimerle is incarcerated.

Statement of Facts

The Government's Case

A. The January 28, 1976 Sale

On January 28, 1976, Special Agent Francis McDonell of the United States Secret Service, operating in an undercover capacity, went to Joyce's Pub in New York, New York. At the pub he was joined by Julian Mitchell, who had been arrested a few days before for attempting to sell counterfeit Federal Reserve notes. Mitchell had agreed to introduce McDonell to the source of his counterfeit notes. (Tr. 9-10).* McDonell arrived

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* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "App." refers to the appendix of the specified defendant; "Br." refers to the brief on appeal of the specified defendant.

with approximately $600 in pre-recorded Secret Service funds, $300 of which he gave to Mitchell. (Tr. 9, 11).

James Heimerle entered the Pub, greeted Mitchell and shortly thereafter, Heimerle, Mitchell and McDonell proceeded to Heimerle's car. In the car Mitchell introduced McDonell to Heimerle as "a stock and bond guy from Philadelphia." (Tr. 12). As they circled the block in Heimerle's car, Heimerle asked McDonell about his background, questioning him specifically about "Willie Benjamin from Philadelphia," whom McDonell identified as a "stock and bond dealer" from northeastern Philadelphia. (Tr. 13-14). Having apparently convinced Heimerle of his credentials, McDonell began discussing the business at hand. McDonell told Heimerle that he was interested in stocks, bonds and treasury bills. Heimerle then told McDonell that he had some counterfeit treasury bills and also offered McDonell counterfeit Federal Reserve notes. McDonell agreed to buy a $5,000 package. (Tr. 14). Heimerle then produced a package which he gave to Mitchell, who examined the contents and passed it to McDonell. McDonell found the package to contain $5,000 in counterfeit $100 Federal Reserve notes. (Tr. 12-13). In exchange for the package, Heimerle was paid $600 in pre-recorded funds, $300 by Mitchell, $300 by McDonell. (Tr. 52). Before parting company, McDonell and Heimerle agreed to meet again for a second sale. Heimerle promised to obtain for McDonell another $5,000 package of counterfeit and a sample counterfeit treasury bill. (Tr. 14).

B. The February 2, 1976 Sale

On February 2, 1976 McDonell returned to the Pub, where he was soon joined by Heimerle. Heimerle again asked that they proceed to his car. As they drove

around the block, Heimerle handed McDonell a small package which contained fifty counterfeit $100 Federal Reserve notes. McDonell examined the package and then paid Heimerle $600 in pre-recorded Secret Service funds. (Tr. 16).

Heimerle informed McDonell that he had been unable to get the counterfeit treasury bill for their meeting, but promised to have it the next time they met. Heimerle asked whether McDonell wanted to buy more counterfeit notes, offering to obtain for McDonell a million dollars in counterfeit Federal Reserve notes. McDonell agreed to take $125,000 in counterfeit notes, but told Heimerle that he wanted to buy this larger package at a lower price of 10 points or $10 on $100, rather than the 12 points that he paid for the smaller packages. Heimerle said he did not know whether he could do that but that he would try. After agreeing to meet again, Heimerle dropped McDonell in front of the Pub and left. (Tr. 16-17).

C. The February 5-6, 1976 Sale

On February 5, 1976 McDonell returned to the Pub accompanied by Special Agent Jane Bisacquino, who was to pose as McDonell's girlfriend "Janie." At about 1:30 p.m. Heimerle arrived and was introduced to "Janie." Once again Heimerle and McDonell entered Heimerle's car and circled the block. (Tr. 21-22).

Heimerle told McDonell that he was having some difficulty getting the treasury bill and that he wanted first to conclude the counterfeit deal. They then discussed the $125,000 package of counterfeit notes, which McDonell told Heimerle he wanted that day. Heimerle told McDonell that he was having some difficulty getting

it and had "to reach out to his people" but he would not be able to do this until after dinner, somewhere around 8:00 o'clock that night. Heimerle stated that he would have to talk to somebody to get the counterfeit. He told McDonell to forget about the Treasury Bill for now, and "just do this counterfeit deal." (Tr. 22).

Heimerle gave McDonell two phone numbers for coin boxes and he instructed McDonell to call him exactly at midnight. (Tr. 23). Heimerle assured McDonell that he would probably be able to get the package and that they could do the deal that night. (Tr. 23). Heimerle then returned to the Pub, where McDonell was dropped off.

On February 6, 1976 at midnight, McDonell called Heimerle at one of the coin box numbers. (Tr. 23). Heimerle said that he could get a portion of the package, about $35,000 in counterfeit, and asked if McDonell wanted it. McDonell agreed to take it. Heimerle told him to meet him at the Brasserie Restaurant, 51st Street between Lexington and Park Avenue. (Tr. 24). Heimerle said that he was quite a distance away from the restaurant and that it would take him at least a couple of hours to pick up the counterfeit. McDonell said that he would wait for Heimerle at the restaurant. (Tr. 25).*

At 1:59 a.m. on February 6, 1976 Harold Rosenberg checked into the Ramada Inn on 8th Avenue in New York City. When he checked in, Rosenberg had no luggage. He paid in advance for one night's stay and signed in as Henry Regan, 1712 Collins Avenue, Boston,

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* At 12:00 a.m. on February 6, 1976 Special Agent George Hemmer of the Secret Service observed Heimerle speaking on a pay telephone in a deserted supermarket parking lot. (Tr. 127).

Massachusetts. Rosenberg was assigned Room 1026. (Tr. 137). Before going to his room, Rosenberg exited the hotel and spoke to a man with light brown hair who was sitting in a car in front of the hotel. Rosenberg then went with the bellhop to Room 1026. (Tr. 144).

At about 2:00 a.m. Agents McDonell and Bisacquino went to the Brasserie Restaurant and waited for Heimerle. (Tr. 26). At 2:30 a.m. Heimerle arrived, saying that he had had a tough time that night because of the snow. He asked McDonell to join him outside. After they left the restaurant, Heimerle said, "Come on, let's go, we are going to take a ride." (Tr. 26). Leaving Biscaquino at the restaurant, Heimerle and McDonell proceeded to the Ramada Inn. Heimerle drove, using an evasive route. (Tr. 27).

After arriving at the Ramada Inn, Heimerle and McDonell proceed to an elevator. McDonell asked Heimerle where they were going, and Heimerle said they were going up to a room "to get the stuff." McDonell told Heimerle that he did not like to deal in hotel rooms. (Tr. 27). Heimerle replied that if he had known this, he would not have dealt with McDonell in the first place. However, McDonell continued to insist that he did not want to deal in a hotel room. Heimerle said, "You can wait in the hall, I will bring it out to you." (Tr. 27). They got off the elevator on the tenth floor of the hotel; Heimerle went to Room 1026 and knocked on the door. He knocked a few times and there was no answer. (Tr. 27-28).

They then returned to the lobby, where Heimerle went to the house phone. After some confusion, Heimerle told the hotel operator, "No, no just give me Room 1026." (Tr. 28). Heimerle then spoke with someone on

the phone, to whom he said, "I am down in the lobby. I want you to bring the package downstairs. I will be out in front of the motel." (Tr. 28).

Heimerle and McDonell then went back to the automobile which was parked on the street outside of the hotel and waited. Rosenberg then came out of the hotel and walked up to car, leaned into the car, and handed Heimerle a package. As he did so Rosenberg asked Heimerle whether "he had gotten the money yet?" (Tr. 28-29). Heimerle replied, "I'll be back in 15 or 20 minutes." (Tr. 29). Heimerle handed the package to McDonell, who found the package to contain 326 counterfeit $100 Federal Reserve notes. (Tr. 29). Heimerle asked for the payment and McDonell replied that the money was back at the restaurant with "Janie." (Tr. 32).

Heimerle and McDonell returned to the area of the restaurant. Heimerle told McDonell to get the money for him, cautioning him not to hand the money to him in the car window and saying, "Don't make it look foolish." McDonell went in to the restaurant and joined Special Agent Bisacquino. Together they proceeded to an undercover car, where they gave the pre-arranged signal for Heimerle's arrest. (Tr. 33).

Upon his arrest, Heimerle was searched. On his person the arresting agents found one of the pre-marked genuine $100 bills with which McDonell paid Heimerle in the first sale on January 28, 1976. (Tr. 155). After arresting Heimerle, Secret Service Agents went to Room 1026 of the Ramada Inn, where they effectuated the arrest of Rosenberg. (Tr. 123-124).

The Defense Case

Heimerle took the stand in his own defense. Heimerle denied any sale of counterfeit to Mitchell or McDonell on January 28, 1976. While admitting that money did change hands on that date, Heimerle stated that he had been given $300 by Mitchell in repayment of a pre-existing debt. He said that Mitchell received the money from McDonell and that he observed Mitchell passing McDonell an envelope. (Tr. 187-88).

Heimerle testified that he appeared at the Pub on February 2, 1976 only to collect the remaining money owed him by Mitchell. When he arrived at the Pub, Heimerle said, Mitchell was not present but McDonell was there. Heimerle testified that he and McDonell had a conversation in Heimerle's car about Julian Mitchell, and that McDonell suddenly began talking about counterfeit. Heimerle denied receiving any money from McDonell or giving anything to the agent at that meeting. (Tr. 191-93).

As to the events of February 6, 1976, Heimerle testified that he had arranged a meeting with Mitchell on the afternoon of the 5th, but that McDonell showed up in his place. Heimerle admitted giving McDonell the phone number, but maintained that he only gave it to him so that they could contact each other concerning Mitchell. (Tr. 194). Heimerle testified that he did deliver the package to McDonell in the early morning of February 6, 1976, but that he did it as a favor for Mitchell and without knowledge of its contents. Heimerle explained that Mitchell had called him and asked him to do this, and that after he had agreed to do so, Mitchell gave him the package for delivery. (Tr. 195, 220-22).

Heimerle testified further that he and Rosenberg had driven into New York that night in order to seek out

"female companionship." To facilitate this, Rosenberg checked into the Ramada Inn on 8th Avenue in New York City, after first being turned away by the Howard Johnson Motor Lodge. (Tr. 198-99, 225-28).

Heimerle stated that he had left the package with Rosenberg for safe-keeping. After locating McDonell, Heimerle brought him to the Ramada Inn to deliver the package for Mitchell. He asked Rosenberg to bring the package down to them. Heimerle characterized Rosenberg as a friend who just went along for the ride and who did not know what was in the package. (Tr. 225-28).

Heimerle then testified to the circumstances of his arrest. He said that the Secret Service agents made several promises to him, specifically, that they would not charge him with a crime if he told them who "Tony" was. (Tr. 195-96, 229).

On cross-examination, Heimerle testified that he spent a good part of February 5th driving between Brooklyn and Washington Heights in Manhattan. This trip was for the purpose of picking up the package from Mitchell for delivery to McDonell. Heimerle readily agreed that he did this for a man whom he really did not trust (Mitchell) and delivered it to a man whom he really did not know (McDonell). (Tr. 219-223). Heimerle admitted that Rosenberg had the package with him at the Ramada Inn and that he delivered the package to the car after Heimerle's telephone request. He maintained that Rosenberg was unaware of the package's contents and that Rosenberg was protecting this package, with unknown contents, from possible theft. (Tr. 225-28). Confronted with his prior convictions for grand larceny, mail fraud, sale of counterfeit Federal Reserve notes and forgery, Heimerle admitted to them. (Tr. 204-09).

Defendant Heimerle rested his case following his testimony in his own behalf.

Rosenberg presented no evidence.

ARGUMENT

POINT I

The district court properly charged the jury with regard to the uncalled witness equally available to both sides.

Heimerle and Rosenberg both claim that the district court committed reversible error in its charge to the jury with regard to an uncalled witness.* Specifically, they argue that Julian Mitchell was a witness available to the Government and not to the defense and, accordingly, Judge Metzner should have charged the jury that an inference could be drawn against the Government based on its failure to call him. This contention lacks merit. Applicable law fully supports Judge Metzner's determination that Mitchell was equally available to both sides and his charge permitting the jury to draw inferences against either side, or not to draw any inference at all, was entirely proper.

To place defendants' argument in context, it is helpful to review the role played by the uncalled witness, Julian

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* Rosenberg's claim is raised by reference to Heimerle's brief. (Rosenberg Br. 16). However, Rosenberg never objected to the court's charge on this or any other ground. (Tr. 319). Accordingly, he has waived this issue, except as to review for plain error. Rule 30, 52(b), F.R. Crim. P.; *United States* v. *Pastore*, 537 F.2d 675 (2d Cir. 1976); *United States* v. *Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974).

Mitchell. Mitchell had been arrested by the Secret Service for possession of counterfeit Federal Reserve notes and consequently agreed to introduce a Secret Service agent to his source, whom he identified as James Heimerle. (Tr. 9-10). On January 28, 1976, Mitchell and Secret Service Agent Frank McDonell went to Joyce's Pub in Manhattan. They were soon joined by Heimerle and an introduction was made. Mitchell consummated a purchase of counterfeit notes from Heimerle in McDonell's presence. This purchase was made entirely in pre-recorded Secret Service funds, part of which Mitchell gave to Heimerle, and part of which McDonell gave to Heimerle. (Tr. 9-20). Following this first transaction, Mitchell had no further connection with the events in this case.*

Mitchell continued to serve as an informant from approximately January 25, 1976 to February 3, 1976. After February 3, 1976 the Secret Service had no further contact with Mitchell. (Tr. 164-69).** Mitchell was indicted by a grand jury in the Southern District of New York in February, 1976 and at the time of trial in the instant case, Mitchell was still under indictment and awaiting trial. (Tr. 164-66).

Prior to trial, counsel for the Government gave Heimerle's lawyer the name, address and telephone num-

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* The Government's evidence showed no relationship between Mitchell and the subsequent events in the case. However, Heimerle testified to the contrary, claiming that Mitchell gave him the counterfeit bills for delivery on February 5, 1976. (Tr. 195).

** Special Agent James Heavey of the United States Secret Service testified at trial that he was the agent responsible for handling Mitchell and that Mitchell had never been offered any special deals in connection with pending criminal matters, never received any money or gratuities from the Secret Service, nor had the Secret Service interceded with the United States Attorney on Mitchell's behalf. (Tr. 165-66).

ber of Mitchell's defense attorney to enable him to subpoena Mitchell, should he desire to do so. Further, defense counsel was informed that the Government did not intend to call Mitchell. (Tr. 295). Mitchell was not subpoenaed by Heimerle. Judge Metzner later commented that Mitchell was avaliable to Heimerle on subpoena. (Tr. 319).*

On these facts, Heimerle and Rosenberg argue that Mitchell was available to the Government, unavailable to them and they were entitled to a charge allowing an inference against the Government only for its failure to call Mitchell. The factors claimed to demonstrate availability to the Government are: first, that Mitchell was under federal indictment; second, that he was an informant for the Secret Service; and third, that he would be entitled to assert his Fifth Amendment rights unless granted immunity by the Government.

In this Circuit availability for the purpose of the missing witness charge has been assessed principally on the basis of the witness' physical availability to the parties. *United States* v. *Armone*, 363 F.2d 385, 404-05 (2d Cir. 1966); *United States* v. *D'Angiolillo*, 340 F.2d 453 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965); *United States* v. *La Rocca*, 224 F.2d 859 (2d Cir. 1955). The same approach has been taken by other courts. *United States* v. *Fisher*, 484 F.2d 868, 870 (4th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974); *United States* v. *Waller*, 422 F.2d 1202, 1203 (7th Cir. 1969), *cert. denied*, 406 U.S. 906 (1972); *Richards* v. *United States*, 275 F.2d 655, 658 (D.C. Cir. 1960), *cert. denied*, 363 U.S. 815 (1960). *But see United States* v. *Johnson*, 467 F.2d 804 (1st Cir. 1972); *Burgess* v. *United States*, 440 F.2d 226, 232 (D.C. Cir. 1970).

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* No demand was ever made upon the Government by Heimerle's counsel to produce Mitchell. (Heimerle App. 43a).

In the cases of an informant physically available to both parties, this Court has held that it is proper to deny the defendant's request for a charge permitting only an inference against the Government for its failure to call the informant, *United States* v. *La Rocca*, *supra*, and it is proper to give a balanced charge as to the inference to be drawn against either side for its failure to call the informant, *United States* v. *D'Angiolillo*, *supra*; *United States* v. *Comulada*, 340 F.2d 449, 452 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965). *See also United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975) (uncalled witness was cooperating defendant; balanced charge appropriate); *United States* v. *Armone*, *supra* (uncalled witness was under subpoena by Government; balanced charge appropriate).

Under these cases, Judge Metzner's charge was entirely proper. Mitchell was physically available to both sides. Judge Metzner correctly informed the jury of Mitchell's availability and instructed them that an inference would be drawn against either side for its failure to call him.*

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* Judge Metzner charged the jury as follows:

> Some questions have been raised about the failure to call Julian Mitchell to testify in this trial. I point out to you that Julian Mitchell is not under the control of either the government or the defendants. Either side could have subpoenaed him to appear as a witness. Therefore, you are free to draw whatever inference you wish as to the failure of the government or Heimerele to call him or you need not draw any inference at all if you do not wish to.
>
> However, there is no presumption against the defendant from its failure to call a witness if it appears to you that his testimony would be merely cumulative or repetitious and of no greater value than the witnesses who have testified. (Tr. 316-17).

It may be fairly argued that Judge Metzner unduly favored the defendants in this charge by instructing the jury that only the defendant was entitled to avoid an unfavorable inference in the event that the uncalled witness would have been cumulative.

Under pertinent case law, the balanced charge given by Judge Metzner would have been appropriate even if Mitchell had been an informant at the time of trial. However, in any event, Mitchell was no longer an informant at that time and he had no special relationship with the Government making him more available to the Government than to the defense. Obviously, the fact that Mitchell was under indictment made him less, rather than, more available to the Government. Similarly, his ability to invoke the Fifth Amendment rendered him unavailable to either side. *United States* v. *Chapman*, 435 F.2d 1245 (5th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).* In any event, the contention that Mitchell would invoke the Fifth Amendment was merely speculative, since defense counsel failed to call him to determine that outside the presence of the jury, as they were surely entitled to do. *See Namet* v. *United States*, 373 U.S. 179, 190 n.9 (1963).**

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* Defendants' argue that the Government could have granted Mitchell immunity had he invoked the Fifth Amendment, suggesting that the Government must immunize defendants so that they may be available as witnesses to other defendants. The Government is not required to do so. *United States* v. *Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975). Nor is there a basis in policy or law for suggesting that the Government must immunize defendants in order to call them to testify as to matters which the Government deems to be cumulative as to its case.

Of course, if the Government had reason to believe that Mitchell would invoke the Fifth Amendment, it would be proper for the Government to refrain from calling him. In such circumstances "defense counsel is under a correlative obligation not to argue any inference fr the absence of the person as a witness," ABA *Standards Relating to the Prosecution Function and the Defense Function*, § 5.7(c) at 125 (1970). Here, Heimerle's attorney repeatedly argued that the jury should draw an unfavorable inference against the Government based on its failure to call Mitchell. (Tr. 268-69, 272, 276).

** Judge Metzner informed defense counsel that he would have charged that Mitchell was unavailable had defense counsel called him and established that he would in fact invoke the Fifth Amendment. (Tr. 319).

POINT II

The trial court fully protected Heimerle from any possible effect of publicity. In any event, Heimerle failed to object to the procedure now assigned as error.

Heimerle argues that the district court erred "in not declaring a mistrial because of trial publicity." (Heimerle Br. 4). This contention is entirely frivolous for several reasons. First, no publicity occurred in this case which could possibly have prejudiced Heimerle. Second, the district court nevertheless took cautionary measures to assure that the jury's impartiality was unaffected by the news stories indirectly related to the case. Finally, defense counsel never sought a mistrial on this ground, nor did he object to any aspect of the procedures adopted by the trial judge.

The basis for this claim of prejudicial trial publicity is news coverage of the escape of John Grillo, who was an inmate at the Metropolitan Correctional Center. The escape occurred on May 4, 1976 while Grillo was being held in the vicinity of the courtroom, pursuant to Heimerle's request that he be available to be called as a defense witness. Prior to his escape, the trial court had determined, upon an offer of proof, that his testimony was inadmissible.* Grillo did not appear before the jury nor was his name mentioned in the presence of the jury.

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* Heimerle informed the court that Grillo would testify that while incarcerated at Allenwood he met a man named "Julian" who told Grillo that "Jimmy" in New York owed him (Julian) money. The import was that "Julian" was the informant, Julian Mitchell, and "Jimmy" was the defendant Heimerle. Both the Government and Heimerle's co-defendant Rosenberg objected on hearsay grounds. Judge Metzner sustained the objections. (Tr. 234-36).

After the jury was excused for the day, Grillo escaped from the attending marshal. The escape resulted in news coverage but only one newspaper, the *New York Daily News*, noted the name of the case for which Grillo had been called to testify. The *News* article did not, however, indicate who had subpoenaed Grillo or for whom he was to testify. (Heimerle App. 13a).

The following day, before proceeding with the trial, Judge Metzner held a robing room conference to discuss the publicity which had occurred. Initially, it was resolved by all counsel not to examine the jury as to any possible prejudice. In fact counsel for Heimerle opposed any inquiry, stating:

> "No, judge. I agree with Mr. Lopez [counsel for co-defendant Rosenberg], I think by drawing attention to it will only intensify the problem." (Heimerle App., 15a)

However, after conferring with Heimerle, counsel requested an examination of the jury as to possible prejudice. At this point Judge Metzner stated that he would:

> "Bring the jury in and asked them if any of them read any of the stories in the newspapers or heard any broadcast on the radio or television last night concerning the escape of a prisoner from the courthouse. Those who raised their hand I think we will bring them in here one-by-one so that there will be no contamination. . . . One by one and interrogate them and assure them of the facts and ask them whether this would effect their ability. (Heimerle App., 18a).

Counsel for Heimerle concurred in the court's proposal. (Heimerle App., 18a).

The court then had the jury brought into the courtroom and asked if any of them had read or heard about the escape. The court found that everyone on the jury had heard about the escape. Thereupon the court stated:

> I would suggest counsel, that I change the procedure and do it in open Court. (Heimerle App., 18a-19a).

Counsel for all parties, including Heimerle, agreed to the Court's amended procedure. The Court proceeded to make the following presentation to the members of the jury:

> Since you read it and some of the articles identify the case, which is this case and some of them didn't, I am going to tell you the facts as they occurred and then ask whether this would affect your judgment at all in determining the issues before us.
>
> The escape had nothing to do with the issues in this case. It involved a man who was incarcerated in the Federal House of Correction behind the courthouse being brought here to testify as a witness.
>
> When he arrived here it was decided he would not be called as a witness. Consequently he remained outside, he never testified as you know, but while he was outside he escaped.
>
> This has absolutely nothing to do with the issues in this case and obviously should not in any affect your determination of the issues that are going to be submitted to you in this case. There is no relationship between the witness and the government or either of the defendants. (Heimerle App., 19a).

After making this lengthy explanation to the jury, the Court inquired as to whether or not it satisfied all counsel. Counsel for all parties, including Heimerle, assured Judge Metzner that they found the explanation satisfactory. (Heimerle App. 20a). The court then asked each juror whether his or her judgment would be prejudiced by the story. Each juror replied that it would not. No objection was made by any party, including counsel for Heimerle. (Heimerle App. 20a).

It is apparent from a recitation of these facts that this case did not involve publicity even arguably prejudicial to the defendant's cause. *Cf. Shepard* v. *Maxwell*, 384 U.S. 333 (1966). In fact, in his brief to this Court Heimerle does not even attempt to explain how this publicity could have prejudiced him. The jurors did not know who called Grillo or what he was expected to say. In addition, Judge Metzner took extensive precautions to assure that the jury had not in any way been affected by the news stories, procedures with which Heimerle entirely concurred. Had Heimerle raised his present contention that a personalized voir dire was required, Judge Metzner could have denied the request as a discretionary matter, *United States* v. *Tropiano*, 418 F.2d 1069, 1080 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), but having failed to even make the request, he cannot now claim that the procedure adopted was erroneous. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). *See also United States* v. *Valdivia*, 492 F.2d 199, 204 (9th Cir 1973), *cert. denied*, 416 U.S. 940 (1974).

POINT III

The genuine $100 Federal Reserve note found on Heimerle at the time of his arrest was properly admitted into evidence.

Heimerle's final claim on appeal is that the trial court erroneously admitted into evidence the genuine $100 Federal Reserve note which was seized from his person at the time of his arrest. Heimerle argues that notwithstanding the Government's evidence that this bill was given to Heimerle in payment for counterfeit notes, it is "quite possible" that the bill was given to Heimerle by Julian Mitchell in repayment of a debt. (Heimerle Br. 10). Due to the existence of this "possibility," Heimerle contends that the bill was admitted without a proper foundation.

The record demonstrates that a proper foundation was laid for the admission of this evidence. Agent McDonell testified that he received approximately $600 in pre-marked bills from Agent Heavey on January 28, 1976, and later that day he gave $300 of that money to Julian Mitchell. (Tr. 9, 11). McDonell further testified that he and Mitchell each gave Heimerle $300 in exchange for the package of counterfeit notes which Heimerle gave them that evening. (Tr. 52). Agent Heavey identified GX 1 as a $100 bill found on Heimerle at the time of the arrest. (Tr. 155). Using a xerox copy of the bill prepared before it was given to Agent McDonell, Agent Heavey was able to identify GX 1 as one of the bills which he gave to Agent McDonell on January 28, 1976.

This foundation was more than sufficient as to both authenticity and relevancy. The requirement of authentication is met by "evidence sufficient to support a find-

ing that the matter in question is what its proponent claims." Rule 901(a), F.R.Ev.; *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (1976). Furthermore, evidence is admissible as relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F.R.Ev.; Rule 402, F.R.Ev. *See also United States* v. *Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).*

Although couched as an objection to the adequacy of the foundation, Heimerle's attack on this evidence really amounts to a jury argument. His claim is merely that he presented evidence, contrary to the Government's, which provided an innocent explanation for Heimerle's possession of this bill, namely, that Mitchell gave it to him in payment of a debt. Although Heimerle was surely entitled to have his explanation of this evidence presented to the jury, the existence of his alternate explanation did not provide a basis for exclusion of the evidence.

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* As is apparent, the Government's theory with regard to GX 1 was that it constituted recent possession of the fruits of the crime. As the Supreme Court in *Wilson* v. *United States*, 162 U.S. 613, 619 (1896), stated:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facia evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.

Accord Barnes v. *United States*, 412 U.S. 837, 843-46 (1973); *United States* v. *Infanti*, 474 F.2d 522, 525 (2d Cir. 1973); *United States* v. *Minieri*, 303 F.2d 550, 554-55 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962).

POINT IV

The evidence at trial was sufficient to establish Rosenberg's guilt beyond a reasonable doubt.

Defendant Rosenberg contends that the evidence as to his knowledge and intent was insufficient to convict him of delivering and selling counterfeit Federal Reserve notes and of participation in a conspiracy to do so. An examination of the evidence in the record refutes this argument.

During the meeting between Heimerle and McDonell on the afternoon of February 5, 1976, Heimerle said that he could obtain counterfeit Federal Reserve notes for McDonell, but that he would have to "reach out to his people" to get them. (Tr. 22). Heimerle indicated that he would be unable to contact them until about 8 p.m. that evening (Tr. 22). To close the deal, Heimerle asked McDonell to call exactly at midnight at one of two preselected telephone coin boxes. (Tr. 23). At midnight McDonell telephoned Heimerle who stated that he could get part of the counterfeit notes McDonell wanted but that he had to travel quite a distance to pick them up for delivery. (Tr. 24-25). Based on this testimony a jury could reasonably infer that Heimerle was acting in concert with others.

The evidence also showed that Rosenberg checked into the Ramada Inn on 8th Avenue in Manhattan at 1:59 a.m. on February 6, 1976 under an assumed name. He paid in advance for one night's stay. (Tr. 137). Before going to the room he was assigned, Room 1026, Rosenberg left the lobby to converse with a man with light brown hair who was seated in a car parked at the front door of the hotel. (Tr. 144).* Special Agent Mc-

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* Heimerle testified that Rosenberg came out of the Ramada Inn, after checking in to tell Heimerle his room number. (Tr. 199).

Donell later accompanied Heimerle to Room 1026 of the Ramada Inn; Heimerle knocked, but no one responded. Using the hotel house phone, Heimerle then called Room 1026 and told the person to whom he spoke to "bring the package downstairs. I will be out in front of the motel." (Tr. p. 28)* Rosenberg then came out of the hotel, went over to Heimerle's car and delivered the package of counterfeit notes to Heimerle in McDonell's presence. At that same time, Rosenberg asked Heimerle whether he had "gotten the money yet." (Tr. 29).

In addition, Heimerle testified that Rosenberg was present at the hotel and that Rosenberg delivered the package to the car. (Tr. 226). When the Secret Service agents went to Room 1026 of the Ramada Inn to arrest Rosenberg, he was alone in the room. (Tr. 123-124).

In *United States* v. *Arcuri*, 405 F.2d 691 (2d Cir. 1968), a case with facts markedly similar to this case, the evidence was found to be sufficient on somewhat less evidence than was adduced here against Rosenberg. In *Arcuri*, the defendant was summoned to the scene by a phone call from his co-defendant. Upon arriving, the defendant conferred with that co-defendant and then gave a bag to the co-defendant, who delivered it to an undercover agent. The bag contained counterfeit notes. This evidence was held to be sufficient for a finding that the defendant was "the partner having physical possession." 405 F.2d at 695.

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* Rosenberg's unquestioning compliance with Heimerle's request by phone to "bring the package downstairs. I will be out in front of the motel" (Tr. 28) raises a substantial inference of guilty knowledge. On a cold and snowy night in February, small parcels are easily delivered in the warmth of the hotel lobby within the view of the hotel desk clerk. Absent guilty knowledge, there was no need to arrange the clandestine meeting outside.

In the instant case, Rosenberg played the equivalent role, but the evidence was even stronger. Rosenberg delivered the package of money to Heimerle and Special Agent McDonell after being summoned by phone by Heimerle. Prior thereto, he was observed meeting Heimerle, a fact from which the jury could find that plans were being made. In addition, Rosenberg used a false identity to check into the hotel, the scene of the delivery. Finally, and most devastating to Rosenberg's claim of innocence, Rosenberg asked Heimerle whether he had "gotten the money yet?" *

Viewed in the light most favorable to the Government, "giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact," *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States* v. *DeGarces*, 518 F.2d 1156 (2d Cir. 1975), the case against Rosenberg was more than sufficient. A jury could fairly find, beyond a reasonable doubt, that he delivered the counterfeit notes to Heimerle as a full partner in the crime, anxious and ready to partake in the profits.

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* Rosenberg attempts to distinguish *United States* v. *Arcuri*, *supra*, on the ground that the defendant there was seen "caucusing" with a co-defendant. (Rosenberg Br. 13). However, equivalent evidence was offered here. Rosenberg's further tries to distinguish *Arcuri* on the ground that the defendant took the stand there and waived his right to review of the Government's case standing alone. However, the Court stated that the evidence was sufficient even before that factor was considered. 405 F.2d at 695.

POINT V

Rosenberg's motion for a severance was properly denied.

Rosenberg argues that Judge Metzner erred in denying his application for a severance, a motion which was first made at the conclusion of the Government's case.

It is well settled that a motion to sever is addressed to the sound discretion of the court, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Turcotte*, 515 F.2d 145, 150 (2d Cir. 1975); *United States* v. *Peden*, 472 F.2d 583, 584 (2d Cir. 1973); *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972), and will not be disturbed on appeal except in cases of clear abuse, *United States* v. *Jenkins*, 496 F.2d 57, 68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States* v. *Projansky*, *supra*, 465 F.2d at 138. On appeal, the defendant must show substantial prejudice as a result of the joinder, i.e. merely a better chance for acquittal if separate trials were had. *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). *See also United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

This Court has repeatedly expressed a general preference in favor of trying together those defendants who are jointly indicted, where the crime charged in the indictment is provable against all such defendants by the same or a similar series of acts. *E.g.*, *United States* v.

Kahaner, 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962) (Weinfeld, J.), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). Such a policy conserves judicial resources, helps to ensure a prompt trial of those accused, avoids duplicative, time-consuming trials and alleviates the burdens of citizens serving as jurors and witnesses.

Rosenberg argues that he was prejudiced by the trial court's failure to grant him a severance because in his testimony Heimerle placed Rosenberg at the scene of the crime, thus creating an inconsistent defense. This argument is without merit for two reasons. First, the possibility in any multi-defendant trial that proof admitted as to one defendant will be harmful to the other does not necessarily justify a severance. *United States* v. *Aloi*, 511 F.2d 585, 598 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975). Second, in the instant case, co-defendant Heimerle took the stand and exculpated Rosenberg by testifying that Rosenberg was merely delivering a package without knowledge of its contents. (Tr. 232). Heimerle went on to provide Rosenberg with an excuse for his presence by describing him as a friend who had just come along for the ride and only appeared at the Ramada Inn that evening for the purpose of seeking "female companionship." (Tr. 232). In summation counsel for Rosenberg relied on Heimerle's testimony and argued to the jury that Rosenberg obtained the room precisely for this purpose. (Tr. 285). In this way, Rosenberg gained the advantage of having a defense raised for him without undergoing cross-examination. The claim that denial of the severance resulted in prejudice must be viewed as frivolous in these circumstances.

CONCLUSION

The judgments of conviction should be affirmed.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Faith Hermann, being duly sowrn, deposes and says that she is employed in the office of the Strike Force for the Southern District of New York.

That on the **1st** day of **October, 1976** she served ~~one~~ copies of the within **brief for the United States** by placing the same in a properly postpaid franked envelope addressed:

Michael B. Pollack, Esq.
1345 Avenue of the Americas
New York, New York 10019

Bennett M. Epstein, Esq.
Evseroff & Sonenshine
186 Joralemon Street
Brooklyn, New York

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Faith Hermann

Sworn to before me this

1st day of **October, 1976**

Jacob Laufer

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Notary Public, State of New York
No. 03[illegible]
Qualified in Kings County
Commission Expires March 30, 1977